

1993

Salt Lake County Cottonwood Sanitary District, a public entity v. Sandy City, Utah, a municipal corporation of the State of Utah : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Salt Lake County Cottonwood Sanitary District v. Sandy City*, No. 930294 (Utah Court of Appeals, 1993).
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DOCKET NO. 95024 IN THE COURT OF APPEALS

SALT LAKE COUNTY COTTONWOOD
SANITARY DISTRICT, a public
entity,

VS.

Case No. 930294-CA

Priority # 15

Intervenors.

APPEAL FROM A SUMMARY JUDGMENT ENTERED BY
THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE KENNETH RIGTRUP, PRESIDING

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FILED
Utah Court of Appeals

MAY 27 1993

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

SALT LAKE COUNTY COTTONWOOD	:	
SANITARY DISTRICT, a public	:	
entity,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	
	:	
SANDY CITY, UTAH, a municipal	:	
corporation of the state of	:	Case No. 930294-CA
Utah,	:	
	:	
Defendant/Appellant	:	Priority # 15
	:	
LAWRENCE P. NEMELKA, Trustee,	:	
GORDON and VICKI HEINRICHS,	:	
	:	
Intervenors.	:	

JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal as a matter transferred from the Utah Supreme Court pursuant to Utah Codes Section 78-2-2(f) and Section 78-2-4.

STATEMENT OF THE ISSUES

Four issues are presented by this appeal. They are as follows.

1. Should the District Courts ruling be reversed because it acted sua sponte, on an issue not argued by the litigants.

2. Did the Sandy City Council have the authority to hear an appeal from its own Planning Commission on a conditional use permit.

3. What standard of review should the District Court have used in examining the actions of the Sandy City Council.

4. Assuming the Sandy City Council could legally hear the appeal did it abuse its authority in overturning the conditional use permit.

These are all questions of law which should be reviewed for correctness with no particular deference given to the Trial Court's Conclusions. Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1991); Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991).

DETERMINATIVE PROVISIONS OF LAW

The following determinative provisions of law are set forth in the addendum to this brief.

1. Utah Code Section 10-9-9 (1953 prior to its repeal in 1992).

2. Sandy City Development Code Chapter 15-23 Conditional Uses.

3. Utah Rule of Civil Procedure 65B(b)(2)(A) & (B).

STATEMENT OF THE CASE

Appellee sought relief from a determination made by the Sandy City Council reversing the decision of the Sandy City Planning Commission to issue it a conditional use permit. The relief was

sought pursuant Rule 65B(e)(2)(A) & (B) of the Utah Rules of Civil Procedure.

Appellee moved for an order reversing the decision of the City Council and reinstating the permit. The records of proceeding before both the Planning Commission and the City Council were submitted to the Court for its review and memoranda were prepared and argued before the Court.

The matter was submitted to the Court after oral argument and the Court, after taking the matter under advisement, issued a memorandum decision holding that the Sandy City Council lacked the authority to hear the appeal. The Court also found there was a substantial basis for the Planning Commission granting the permit and ordered the permit reinstated.

RELEVANT FACTS

1. In March 1991 Appellee applied for a conditional use permit to build a facility in a area of Sandy City. (record page 278).
2. The Sandy City zoning for that area was residential R-1-8 (record Page 278).
3. The Sandy City residential R-1-8 zone allows certain public service facilities as a conditional use. (record page 325).
4. The Sandy City Planning Commission pursuant to the Sandy City Development Code reviews all conditional use applications. (Record pages 314-319).
5. The Planning Commission determined the facility was a public service facility and after accepting evidence at a public

hearing granted a conditional use permit. (record page 134).

6. Sandy City ordinance 15-23 governing conditional uses provided that appeals concerning conditional uses can be heard by the Sandy City Council. (record page 313).

7. Certain citizens appealed the granting of the permit to the Sandy City Council. (record pages 136-138).

8. On July 16, 1991 the Sandy City Council heard the appeal. (record pages 139 to 219).

9. On July 30, 1991 the Council voted to overturn the issuance of the conditional use permit. (record pages 233- 234).

10. The City Council issued findings of fact and conclusions of law concerning the disapproval. (record pages 236-245).

SUMMARY OF THE ARGUMENT

The District Court erred in basing its decision on an issue that was not raised or argued by the litigants.

There is no legal reason the Sandy City Council can not hear appeals concerning the granting of conditional use permits.

Conditional Use Permits are not equivalent to variances or nonconforming uses and are not therefore the exclusive province of Boards of Adjustment.

The District Court applied the wrong standard of review for the actions of the City Council. The Court should have given deference to the factual conclusions of the Council and not interfered with the discretionary decision of the Council as it was not shown that the City Council acted arbitrarily, unreasonably or capriciously.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY INTRODUCING
AN ISSUE WHICH WAS NOT RAISED BY EITHER PARTY
DURING THE TRIAL.

Because the District Court introduced an issue which was not raised by either party, the decision made by the district court should be overturned. The applicable rule was cited by the Utah Supreme Court in Warren's Drive-Inns, Inc. v. Combe, 680 P.2d 733 (Utah 1984); "It is error to adjudicate issues not raised before or during trial and unsupported by the record. Trial court is not privileged to determine matters outside the issues of the case, and if he does, his findings will have no force or effect." Id. at 736. Warren's involved a plaintiff and a defendant who were co-owners of a corporation. After a dispute between the two parties, the plaintiff brought suit to force the defendant to reimburse the corporation for a number of alleged abuses. The trial court held that the corporation owned by the parties had been dissolved, despite the fact that neither of the parties had advanced such an argument at trial. On appeal, the decision of the trial court was overturned because it was not grounded in the issues as framed by the two parties during the trial.

The case of Girard v. Appleby, 660 P.2d 245 (Utah 1983) is another case which supports the rule that a trial court may not act

sua sponte in deciding what action to take. Girard involved a number of plaintiffs who sought to enjoin the defendants from conducting a health spa business on a leased premises and to declare a forfeiture of the lease. After the action was brought, all of the plaintiffs except for Girard came to terms with the defendants and dismissed all issues. However, when Girard moved to amend the complaint to include a cause of action for waste and violations of the health and business codes, the court, sua sponte, set aside its decision to grant dismissal with regard to all plaintiffs except Girard and joined the other plaintiffs as involuntary defendants. On appeal, the defendants challenged the action of the trial court. The appellate court held that a trial court has authority to reopen a case, but cannot do so sua sponte. In the words of the court,

Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver of the claim. Id. at 247.

The instant case closely parallels the cases cited above. The parties addressed the standard of review that should be applied in reviewing the decision of the Sandy City Council. They also raised an issue as to whether or not the scope of the authority of the City Council is limited by Sandy City Code Section 15-23-6. Their arguments, however, assumed that the City Council did have valid authority to hear the case. The City Council's authority to hear

the appeal was never an issue in the case because it was not raised by either party during the case. The Court acting sua sponte, decided the case on grounds that were not presented by the parties. The court erred in the same manner as the trial court in Warren's that decided the corporation had been dissolved even though neither had argued for such a result, and the trial court in Girard, that reopened a case despite the fact neither party moved for such action.

Because the court decided the case on grounds that were not argued at trial and based on an issue which was not raised at trial, the decision of the district court should be overturned. Even if the district court was correct in its conclusion, the issue was not raised by Appellee 's counsel and according to the Girard court "it is generally viewed as a waiver of the claim." Id. at 247.

POINT II

THE DISTRICT COURT ERRED IN RULING THAT THE
SANDY CITY COUNCIL LACKED THE AUTHORITY TO
HEAR THE GRANTING OF CONDITIONAL USES.

The District Court in its memorandum decision found that the Sandy City Council lacked the authority to hear the appeal concerning the conditional use permit because it is the legislative body of Sandy City. This is not a valid reason for this conclusion. The Utah Legislature in 1989 enacted Section 10-9-9(2), Utah Code Annotated¹ which provided that,

¹ This section and the rest of the Municipal planning and zoning enabling act was repealed in 1991 and replaced with U.C.A. sections 10-9-101 et. seq. the Municipal Land Use Development and Management Act. The new section is U.C.A. 10-9-704.

Appeals from the decisions of the Planning and Zoning Commission regarding Conditional Use permits shall be heard by the Board of Adjustment unless the legislative body of the municipality by ordinance has designated another body as the appellate body for those matters.

In reliance on this Section, the City Council passed Ordinance 15-23-7 which gave them authority to hear these appeals. If the court had not acted sua sponte in ruling that the City Council did not have the authority to hear the appeal, the City could have shown that this particular section was passed specifically to clarify the confusion created by the cases the court relied on in deciding the Council had exceeded its authority. Those cases are Scherbel v. Salt Lake City Corporation, 758 P.2d 897 (Utah 1988) and Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988).

These two decisions confused the area of conditional uses. In the Scherbel case the Utah Supreme Court found that the Salt Lake City Council, as the legislative body of the City, "May not hear appeals from zoning decisions of a planning commission." (Scherbel, supra at 899). The Scherbel case, however, did not involve a conditional use permit but involved an application for conceptual approval of a development within a historic district. Subsequently, in Davis County v. Clearfield City the Court disallowed a similar appeal process. Davis County did involve the granting of a conditional use permit, but Clearfield City is not a city organized under the optional Mayor/Council form of government (See Section 10-3-1201 et seq., Utah Code Annotated) and is therefore not organized into two distinct legislative and executive

branches of government. In spite of this distinction between the forms of government between Salt Lake City and Clearfield City, the Appellate Court in Davis County v. Clearfield City referred to the Scherbel decision, in dicta, as a reason the Clearfield City Council should not hear appeals of conditional use permits.

Because of the confusion created by these two cases and the special nature of conditional use permits, the legislature amended Section 10-9-9 of Utah Code Annotated in 1989 to clarify that a board of adjustment had a role in conditional use permits only if the legislative body of the city did not designate another body to hear appeals from conditional use permits. Since neither the plaintiff nor defendant raised the issue of the City Council's power to hear the appeal at the lower court, the record on appeal does not contain any of the legislative history behind the amendment.

The District Court based its decision in part on what it perceived as a fundamental problem of separation of powers with the city council being involved in the granting or denial of conditional uses. The court misunderstood the nature of a conditional use permit and the law of separation of powers in local government.

There is no constitutional requirement that a city government be separated into executive and legislative branches. The form and nature of local governments is determined by legislative enactment. (See Martindale v. Anderson, 581 P.2d 1022 (Utah, 1988). Sandy

City is divided into two equal and separate branches of government under Utah Code Section 10-3-1201 et.seq. and the power of the City Council is generally established by the provisions of these sections, but the city council are given other powers by legislative enactment which are not strictly legislative in nature. For example, the Sandy City Council is enabled by state law to function as the governing board of the redevelopment agency and hold hearings in which testimony and evidence are given (Section 17A-2-1203 and 1224 Utah Code Ann.); it can act as the appeals board for certain employee terminations (Section 10-3-1106 Utah Code Ann.); and sit as the board of equalization for municipal improvement districts (Utah Code Ann. section 17A-3-317). These are all functions similar to hearing appeals of conditional uses, are quasi judicial in nature and are not typical legislative activities.

The Sandy City Council's role as an appeals board on conditional uses presents a separation of powers problem only if there is no legislation which enables it to do so or if it conflicts with a function given only to the executive branch. Neither of these is true in this instance.

POINT III
CONDITIONAL USE PERMIT APPROVALS ARE AN
APPROPRIATE FUNCTION OF A CITY'S LEGISLATIVE
BODY.

The District Court Judge reasoned that the City Council lacks the authority to hear conditional use appeals because the process of approving nonconforming uses or variances is substantively the

same as approving conditional uses and that therefore the City Council was stepping into the exclusive province of the City's Board of Adjustment. (See Memorandum Decision on page 6). This shows a lack of understanding of the nature of conditional uses.

Conditional uses are different from nonconforming uses and variances. Nonconforming uses and variances are creation of state law and are intended to relieve hardships created by zoning enactments.² Conditional uses are creations of the local zoning ordinance. No right to a conditional use exists unless it is given by the local zoning ordinance.³

The Sandy City Code does create conditional uses. (See Sandy City Development Code, Section 15-23-1 et seq.). The Sandy City Code provides that the City Council is the body that hears appeals from decisions of the Planning Commission regarding Conditional Use Permits. (See Section 15-23-7, Sandy City Development Code). This process of approving conditional uses is significantly different from recognition of a nonconforming use or the approval of a variances. Property owners of Sandy City have a right to appear before the Board of Adjustment to claim the existence of the nonconforming use or request a variance, regardless of the Sandy City Development Code, because the Utah Legislature has given them that right. A property owner has the right to apply for and

² The prior sections of the Utah Code Ann. were 10-9-6 and 10-9-12. These have been replaced by Utah Code Ann. sections 10-9-408 and 10-9-704.

³ The current code is Utah Code Ann. section 10-9-407. There was no equivalent provision in the prior law.

receive a conditional use only upon the terms and conditions of Sandy City Ordinances.

The nature and structure of the conditional use permit is substantively the same as that of an application for amendment to the zoning ordinance. State law provides that an amendment to the zoning ordinance is first processed through the Planning Commission for its recommendation and then, after appropriate public hearing, to the City Council for its action. (See Utah Code annotated 10-9-402 and 10-9-403).⁴ The Sandy City Development Code provides that Conditional Use Applications are processed through the Planning Commission and then may be appealed to the City Council for final determination. (Sandy City Development Code 15-23).

The criteria as to whether or not to grant a Conditional Use Permit is also substantively the same as the amendment to a zoning ordinance. The Sandy City Development Code defines a conditional use as "a use which would become harmonious or compatible with neighboring uses through the application and maintenance of qualifying conditions, as provided in Chapter 15-23" (record at page 322). Chapter 15-23 of the Sandy City Development Code provides that:

The purpose and intent of a conditional use is to allow the compatible integration of specified uses which are related to the permitted uses of the district, but which may be suitable and desirable only by compliance with specified conditions. Uses other than permitted uses shall not be allowed unless after an appropriate administrative review, a use is determined to be compatible, suitable,

⁴ The prior law was Utah Code Ann. 10-9-5.

desirable and related to permitted uses of the district and appropriate conditions are imposed. See Sandy City Development Code, Section 15-23-1.

This determination of compatibility, suitability, desirability and the imposing of conditions is not an executive function, but is the setting of city policy. The Utah Supreme Court in the case of Martindale v. Anderson 581 P.2d 1022 (Utah 1978) clarified the roles of the executive and legislative in cities operating under the council-mayor optional form of government. The Court held that "legislative powers, are policy making powers while executive powers are policy execution powers." Id. at page 1027.

Since the granting of a conditional use permit is a policy making function it is inappropriate for the Board of Adjustment to have final authority. The Utah Supreme Court has previously determined that a board of adjustment lacks the power to grant a variance in use. (See for example Walton v. Tracy Loan & Trust Co., 97 Utah 249, 92 P.2d 724 (Utah 1939)). Since the decision whether to grant a conditional use permit, as it is defined by Sandy City ordinance involves the determination of the appropriate use for a piece of property it would be an inappropriate interference with the legislative process for the Board of Adjustment of have the final say.

POINT IV
THE DISTRICT COURT ERRED IN SELECTING THE
STANDARD FOR REVIEW WHICH IT APPARENTLY APPLIED
TO THE DECISION OF THE SANDY CITY COUNCIL.

The standard of review which the district court applied in this matter is not clear from the Memorandum Decision.

Appellee argued in its Memorandum in Support of Overturning the Sandy City Council Decision that the courts should review the actions of the City Council under the procedure approved in the Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988). Assuming the district court adopted this argument and used this standard of review, the court committed error. The procedure and standard of review used in the Davis County case is completely inapplicable to this action. The Davis County case contained specific circumstances which resulted in the Court applying a unique standard of review. The court in Davis County, because of the unique procedural posture of the case, found:

Thus, the nature of the review by the district court was a hybrid proceeding involving some elements of administrative review and some elements of an independent civil action. That is, the trial court did not limit its review to consideration of the record, as is typically the case in reviewing administrative decisions where a record is available, but heard two days of extensive testimony from various witnesses as is more typical of an independent civil action. Id. at 709.

The appeals court in Davis County approved of this procedure of receiving additional evidence for two reasons. First, the trial court was concerned about the secretive nature and lack of any records or minutes of the City Council's allegedly illegal pre-meeting. Second, the Planning Commission had failed to give any reasons for denying the permit and the City Council had refused to enter any formal findings in support of the decision. Id. at 709 and 710. Based on this, the Court of Appeals determined the trial

court's novel review was appropriate. These unusual conditions do not exist in the present case.

The Sandy City Council and the Planning Commissions records were both available to the trial court and indeed reviewed by the trial court. Further, the Sandy City Council issued formal Findings and Conclusions for the trial court to review. (See record at pages 235 through 246). The standard of review urged on the court by Appellee was totally inapplicable to this particular matter.

The appropriate standard of review for the trial court to use was that as discussed in the case of Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991). In this matter the decision of the Salt Lake County Career Services Council was challenged by Tolman. Tolman petitioned the court for an extraordinary writ under Rule 65B of the Utah Rules of Civil Procedure just as did the appellee in this matter. The appeals court, in discussing the appropriate standard of review for such an appeal, said:

A claim that a tribunal has "abused its discretion" may more accurately be framed as a claim that the tribunal has "misused" or "exceeded" its discretion. An abuse of discretion, therefore, is an act by a tribunal, not a standard of review in and of itself. A reviewing court discovers such acts by applying varying standards of review depending upon the error alleged. For example, if an alleged error involves a tribunal's factual findings, a determination clearly within the arena of the tribunal's discretion due to its advantaged position to hear and see the evidence firsthand, we review the tribunal's factual findings using a clearly erroneous standard, giving great

difference to the tribunals findings. See Utah Rules Civil Procedure 52(a). If an alleged error involves other decisions that are traditionally left to the discretion of a tribunal, we will not disturb the tribunal's determination unless it is "arbitrary, capricious or unreasonable." (citations omitted). If, however, a party claims that a tribunal has stepped out of the arena of discretion and thereby crossed the law, we review using a correction of error standard, giving no deference to the tribunals legal determination. Id. at 27.

This describes the appropriate standard of review which the district court should have applied to the decision of the Sandy City Council to overturn the appeal of the Conditional Use Permit. It is also the standard of review which this Court should apply since as stated in Tolman:

Under Rule 65B, this court looks at the administrative proceeding as if the petition were brought here directly, even though technically it is the district court's decision that is being appealed. (citations omitted) Since the review performed by the district court under Rule 65B is a review of the entire record, it is the same review that would have been afforded if the matter were raised as a direct appeal. Id. at 26.

Since appellant believes that the Sandy City Development Code previously cited gives the authority to the Sandy City Council to exercise its discretion in the issuance of conditional use permits, and since the Sandy City Council issued appropriate Findings of Fact and Conclusions of Law which support its decision and acted totally within an area where it has discretion, the trial court and, therefore, this court, should uphold the factual findings unless there is clear error and since zoning is an area

which is traditionally left to the discretion of city councils, the discretionary aspects of the findings should not be disturbed by the district court or this court unless the zoning decision is clearly arbitrary, capricious or unreasonable.

The decision of the Sandy City Council was not arbitrary, capricious or unreasonable. A review of the record clearly shows that the matter was disputed before the planning commission and the conditional use permit was issued on a split vote (See record on page 134) and the matter was further disputed in front of the Sandy City Council. Testimony was taken both in favor and against the granting of the conditional use permit. Much testimony was given concerning the adverse nature of the proposed conditional use on the community surrounding the use. (See record pages 164 to 219). A review of this record will show that the determination of the Sandy City Council, while not without controversy, is supported by evidence sufficient to make it not arbitrary, capricious or unreasonable.

CONCLUSION

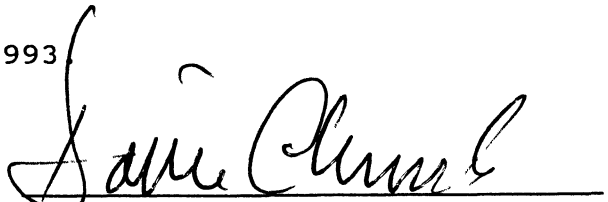
The decision of the District Court should be overturned. The District Court founded its ruling on an issue which was not raised by any party at the trial court level. That issue is whether or not the Sandy City Council has the authority to hear the appeal of the Conditional Use Permit. Since this issue was not raised by either party, the court committed error in ruling that Sandy City Council did not have the authority to hear the dispute and therefore upholding the conditional use permit.

The Sandy City Council is the appropriate body in Sandy City to hear appeals of conditional use permits. The legislature has enabled the City Council to hear conditional use permits. Conditional use permits are not like variances or nonconforming uses, but require a policy determination on behalf of Sandy City. The Sandy City Council is the policy making body for Sandy City.

The Sandy City Council acted appropriately in hearing the appeal, taking testimony and issuing its Findings and Conclusions. The record of the appeal before the Sandy City Council shows that the Findings and Conclusions were based on testimony and evidence presented to the Sandy City Council. The decision to overturn the Planning Commission's granting of the conditional use permit is supported by the record and is therefore not arbitrary, unreasonable or capricious. This Court should not interfere with the discretion of the Sandy City Council making that determination.

The Court of Appeals should rule that the District Court erred in its conclusions that the Sandy City Council lacked the authority to hear the conditional use permit and revoke the conditional use permit.

DATED this 27 day of May, 1993.

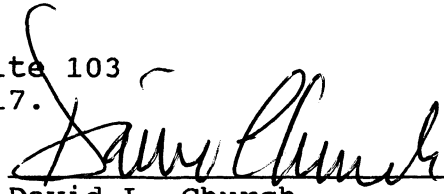

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant, postage prepaid, this 27 day of May, 1993 to:

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ADDENDUM

- EXHIBIT "A" -- COMPLAINT
- EXHIBIT "B" -- MEMORANDUM DECISION
- EXHIBIT "C" -- CITY COUNCIL'S FINDINGS AND CONCLUSIONS
- EXHIBIT "D" -- UTAH CODE SECTION 10-9-9 (1953 PRIOR TO ITS
APPEAL IN 1992)
- EXHIBIT "E" -- SANDY CITY DEVELOPMENT CODE Chapter 15-23
Conditional Uses.
- EXHIBIT "D" -- UTAH RULE OF CIVIL PROCEDURE 65B(e)(2)(A) & (B)

EXHIBIT "A"

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IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY COTTONWOOD
SANITARY DISTRICT, a public
entity,

Plaintiff,

vs.

SANDY CITY, UTAH, a
municipal corporation of
the state of Utah

Defendant.

LAWRENCE P. NEMELKA, trustee,
GORDON and VICKI HEINRICHS,

Intervenors.

FIRST AMENDED COMPLAINT
FOR EXTRAORDINARY RELIEF

Case No. 910905227CV

Judge Kenneth Rigtrup

Plaintiff complains of defendant and for cause of action
alleges as follows:

1. The plaintiff is a public sewer improvement district
authorized to operate sanitary sewer service in Salt Lake County,
state of Utah, pursuant to the provisions of 17A-2-301 et seq, Utah
Code Annotated. The plaintiff is a special district as that term
is defined in §17A-1-404(19)(d) and is therefore subject to all of
the restrictions and entitled to all of the powers and vested with
the authority of special districts under the applicable provisions
of Utah law.

2. The defendant is a municipal corporation of the state of Utah governed by a mayor-council form of government; the members of the city council which is the entity of the defendant causing the action of which the plaintiff complains are Dick Adair, Bryant Anderson, Scott Cowdell, Ron Gee, Dennis Tenney, Bruce Steadman, and John Winder.

3. The relief requested by the plaintiff is authorized by the provisions of Rule 65B(a)(e)(2)(A) (as amended September 1, 1991) in that the plaintiff has no other plain, speedy and adequate remedy at law, the defendants exercised judicial functions and the relief requested by the plaintiff is in the nature of mandamus.

4. On March 22, 1991, the plaintiff filed an application for a conditional use permit number CU91-08 with the planning department operated by the defendant to locate a public service facility and public improvement in the nature of an administrative office and vehicle garage at approximately the intersection of Viscounti Drive and Highland Drive within the corporate limits of the defendant Sandy City. The original conditional use application filed by the plaintiff was amended after notice and after public hearing and on May 8, 1991, the community development department of the defendant recommended to the planning commission of Sandy City that the conditional use application of the plaintiff be granted.

5. After a public hearing on May 16, 1991, considering the favorable professional recommendation of the planning staff and considering the adverse comments of the public in the public

hearing, conditional use permit No. 91-14 was issued to the plaintiff by the planning commission of Sandy City, allowing the construction of the public service facilities consisting of the administrative office and garage.

6. The approval of the planning commission of Sandy City incorporates findings found as follows based on the record before it: that the proposed use by the plaintiff is a public service facility which is not a maintenance facility, that the proposed use is an authorized conditional use under the applicable zoning ordinance of the defendant which allows public service facilities to be located as conditional uses within the R-1-8 zone, that the use by the plaintiff would be compatible in the neighborhood, that the proposed use by the plaintiff at 8620 South Highland Drive, Sandy, Utah, is necessary or desirable to provide the public service required to be provided by the plaintiff which would contribute to the general well-being of the community at large and the specific neighborhood and that the use under the circumstances would not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity or injurious to property or improvements in the vicinity. The planning commission also found that the proposed use would comply with regulations and conditions specified in the code and by the planning commission by such use and that the proposed use would conform to the intent of the Sandy City comprehensive plan.

7. The plaintiff agreed to comply with all of the conditions of the conditional use permit issued by the planning commission by Sandy City as part of the approval by the planning commission.

8. After the issuance of conditional use permit No. 91-14 by the defendant, a review of the issuance of the conditional use permit was undertaken by the city council pursuant to an appeal from residents in the area. The request for reconsideration of the conditional use permit was in the nature of an appeal and was heard by the city council of the defendant beginning on July 16, 1991, and continuing with an open record until July 30, 1991. Prior to the July 16, 1991, hearing and during the hearing, defendants indicated that the burden of proof to sustain the appeal was on the appellants. The hearing proceeded as follows:

1) The planning department of the Defendant City was asked to review and restate the record verbally for the city council and advise the city council of the status of the matter.

2) The appellants were required to go forward with a presentation on the issues presented by the letter of appeal.

3) The plaintiff was permitted to present testimony regarding the issues raised by the appellants on appeal.

At no time was the plaintiff advised that the plaintiff would be required to bear the burden on appeal.

9. At the meeting of the Sandy City council on July 30, 1991, a majority of the city council of the defendant voted to

reverse the decision of the planning commission and the defendant revoked the conditional use permit issued to the plaintiff.

10. After the formal vote of the Defendant City Council and after the filing of the initial complaint herein, and the defendants' answer, the Defendant City Council purported to adopt Findings of Fact and Conclusions of Law governing the decision of the City Council on July 30, 1991. A copy of the relevant resolution No. 91-60C and the "Findings of Fact and Conclusions of Law" adopted by the Defendant City are attached to this amended complaint as Exhibit 1.

11. The Findings of Fact and Conclusions of Law adopted by the defendant were adopted without notice to the plaintiff and without an opportunity for hearing with respect to the accuracy or applicability of the findings and conclusions to the decision of the Defendant City Council.

12. The findings of fact failed to support the decision of the City Council and state no factual matters which would justify the conclusions of law adopted by the City Council.

13. The conclusions of law purport to place the burden of proof with respect to the issues on appeal on the plaintiff contrary to the representations by the Defendant City Council at the public hearing on the appeal.

14. By not advising the plaintiff of the burden of proof prior to the hearing of the appeal and by applying a burden of proof to the hearing shifting the burden of proof to the plaintiff

after the fact, the defendants violated fundamental principles of fairness, failed to advise the plaintiff of the burden of proof which would be applied to the determination of the issues and denied the plaintiff fundamental due process of law by adopting a burden of proof standard after the hearing which is different than the burden of proof standard disclosed to the plaintiff prior to the hearing.

15. The action by the defendant's city council in revoking the conditional use permit issued by the defendant was unlawful, arbitrary, and capricious, violated fundamental concepts of fairness and due process and was not based on facts or on legally sufficient reasons for denying the conditional use permit to the plaintiff.

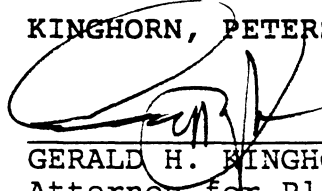
16. In the absence of ascertainable and reasonable factual grounds for the revocation by the defendant of the conditional use permit issued to the plaintiff by the Sandy Planning Commission, the court should affirmatively order the conditional use permit reinstated to allow the construction of the public improvements required by the plaintiff.

The court should issue a hearing order pursuant to the provisions of Rule 65B(e)(3) U.R.C.P. (1953 as amended 1991) to the defendant ordering that the defendant be and appear before the court at a time certain then and there to show cause, if any exists, why the decision of the city council of the defendant should not be reviewed by the court and reversed and the

conditional use permit issued to the plaintiff by the planning
commission reinstated by order of the court.

DATED this 8 day of January, 1992.

KINGHORN, PETERS & PROBST

A handwritten signature in dark ink, appearing to read 'Gerald H. Kinghorn', is written over a horizontal line.

GERALD H. KINGHORN
Attorney for Plaintiff

EXHIBIT "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY COTTONWOOD	:	MEMORANDUM DECISION
SANITARY DISTRICT, a public	:	
entity,	:	CIVIL NO. 910905227
Plaintiff,	:	
vs.	:	
SANDY CITY, UTAH, a	:	
municipal corporation of the	:	
State of Utah,	:	
Defendant,	:	
LAWRENCE P. NEMELKA, Trustee,	:	
GORDON and VICKI HEINRICHS,	:	
Intervenors.	:	

Plaintiff Salt Lake County Cottonwood Sanitary District seeks by its Amended Complaint herein relief from a determination made by the Sandy City Council on or about July 30, 1991 to reverse the decision of the Sandy City Planning Commission to issue plaintiff a conditional use permit. Said relief is sought pursuant to Rule 65B(e)(2)(A) & (B), Utah Rules of Civil Procedure.

Plaintiff has moved for an Order reversing the decision of the Sandy City Council and reinstating the conditional use

permit granted by the Sandy City Planning Commission. The parties have submitted Memoranda on the issues. Records of the proceedings of the Sandy City Planning Commission and the Sandy City Council have been submitted for the Court's review. The Court heard oral arguments from the respective parties. Thereafter, the parties submitted to the Court for its decision whether or not the Sandy City Council exceeded its authority or acted arbitrarily and capriciously in reversing the decision of the Sandy City Planning Commission to issue plaintiff a conditional use permit. The Court has considered the records of the Sandy City proceedings and the Memoranda submitted by the parties.

DISCUSSION

Plaintiff sought by its application to Sandy City to obtain a conditional use permit to construct an administrative site consisting of an office, vehicle garage and related parking facility at 8620 South Highland Drive, Sandy, Utah. Following several hearings, the Planning Commission determined that plaintiff's proposed facility was a "public service," thus qualifying it as a conditional use within the R-1-8 Residential zone. Sandy City Development Code, Section 15-7-5(c)(8).

After prescribing a number of conditions, to which plaintiff agreed to be bound, the Sandy City Planning Commission approved plaintiff's conditional use of the subject property on May 16, 1991.

Some of the residents of the area filed an appeal therefrom with the Sandy City Counsel on June 3, 1991. The applicable statute controlling appeals from decisions of planning and zoning commissions at that time was found in Section 10-9-9(2), Utah Code Ann. (1991 Cum Supp.). The controlling provision which became effective April 24, 1989, provided:

Appeals from the decisions of the planning and zoning commission regarding conditional use permits shall be heard by the board of adjustment unless the legislative body of the municipality by ordinance has designated another body as the appellate body for those matters. (Emphasis added.)

The statute appears to have enabled the legislative body of a municipality to designate another body to hear such appeals; however, there is nothing in such enablement indicating a legislative intent to change or alter the powers exercisable by a board of adjustment. In effect, the statutory scheme simply allows another body to act as the board of adjustment.

Sandy City Council by its Ordinance 15-23-7 appointed itself as the appeals body in such cases. A copy of said

ordinance is attached hereto as "Attachment A." Based upon said ordinance, the Sandy City Council then proceeded to handle the appeal.

Subsection (3) of the ordinance permitted the Council to hold public hearings or to conduct evidentiary review outside the Planning Commission record to determine whether:

(b) the proposed use would (i) influence patterns of growth adverse to the integrity of the comprehensive plan as implemented by the zoning ordinance; . . . or (iii) undermine the health, safety or welfare of the surrounding neighborhood or community.

At the Council meeting of the Sandy City Council on July 16, 1991, the Council received input from Gil Avellar, Senior Planner, who presented a detailed history of the project and the prior approval process. In addition, the Council received significant comments from the public and permitted the response of plaintiff.

On July 30, 1991 the Council voted to deny the conditional use authority and reverse the earlier decision of the Sandy Planning Commission. Resolution #91-60 C was entered formally by the Council on October 1, 1991 disapproving the Salt Lake County Cottonwood Sanitary District's application for a conditional use of the subject property. Apparently Findings of Fact and Conclusions of Law were also entered.

Counsel for defendant in Sandy City's Memorandum has identified the Sandy City Council as the legislative body of Sandy City. In addition, he points out that Sandy City is organized under the "optional" form of municipal government as provided in Section 10-3-1201, et seq., Utah Code Ann.

"The authority to resolve zoning disputes is properly an executive function rather than a legislative one." Scherbel v. Salt Lake City Corporation, 758 P.2d 897, 899 (Utah, 1988). Counsel for Sandy City recognizes this, yet suggests that the Utah State Legislature amended Section 10-9-9(2), Utah Code Ann., to correct the effects of this decision and the decision in Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988), on municipalities using conditional uses.¹ This position is simply untenable.

Section 10-3-1209, Utah Code Ann., provides that:

The optional form of government known as the council-mayor form vests the government of a municipality which adopts this form in two separate, independent, and equal branches of municipal government; the executive branch consisting of a mayor and the administrative departments and officers; and the legislative branch consisting of a municipal council. (Emphasis added.)

¹ Although counsel for Sandy City acknowledged that Scherbel stood for the proposition that the resolving of zoning disputes involves an executive function, no mention was made of the fundamental separation of powers problem addressed in that case and involved in this case.


The Utah Supreme Court at page 899 in Scherbel, supra, concluded that, "A city council under the council-mayor form of government may not hear appeals from zoning decisions of a planning commission." The Court concludes that the process of approving non-conforming uses or variances is not substantively different from approving conditional uses. Accordingly, the Court concludes that the Scherbel decision is controlling in this case.

A review of the various Sandy City records discloses that there was substantial basis for the approval of the conditional use permit by the Sandy City Planning Commission in favor of the Salt Lake Cottonwood Sanitary District. The Sandy City Council being without authority to review planning commission decisions, the grant of the conditional use permit by the Sandy City Planning Commission should be reinstated.

Based upon the foregoing, the Court orders entry of an order reversing the decision of the Sandy City Council embodied in Resolution #91-60C entered October 1, 1991, affirming the decision of the Sandy City Planning Commission of May 16, 1991 and ordering the planning commission to issue the conditional use permit to Salt Lake County Cottonwood Sanitary District forthwith.

Counsel for plaintiff shall submit an appropriate Order on the rulings herein contained.

Dated this _____ day of November, 1992.



KENNETH RIGTRUP
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 27 day of November, 1992:

Gerald H. Kinghorn
Bill Thomas Peters
Attorneys for Plaintiff
9 Exchange Place, Suite 400
Salt Lake City, Utah 84111

David L. Church
Attorney for Defendant
51 East 400 South, Suite 200
Salt Lake City, Utah 84111

Richard S. Nemelka
Attorney for Intervenor
2046 East 4800 South, Suite 103
Salt Lake City, Utah 84117

Walter R. Miller
Sandy City Attorney
440 East 8680 South
Sandy, Utah 84070

Sandy City Council
440 East 8680 South
Sandy, Utah 84070

Sandy City Planning Commission
440 East 8680 South
Sandy, Utah 84070

Salt Lake County Cottonwood
Sanitary District
1400 East 7000 South
Salt Lake City, Utah 84121

Walter R. Miller

(1) All appeals from decisions of the Planning Commission regarding conditional use permits shall be heard by the City Council.

(2) Except as provided in subsection (3), review of decisions of the Planning Commission shall be confined to the administrative record developed by the Commission.

(3) The City Council may hold a public hearing or permit an evidentiary review outside the Planning Commission record to determine whether:

(a) An alleged procedural irregularity has occurred that does not appear in the record.

(b) The proposed use would (i) influence patterns of growth adverse to the integrity of the comprehensive plan as implemented by the zoning ordinance; (ii) have a long-term detrimental impact on City resources available for capital improvements or urban services; or (iii) undermine the health, safety or welfare of the surrounding neighborhood or community.

(4) Hearings may be held by the City Council itself, or by any Council member, hearing examiner, or agent appointed by the Council.

(5) The City Council may overrule any approval or disapproval by the Planning Commission, or any conditions imposed. It may approve or deny the conditional use, impose additional conditions thereon, or remand the appeal to the Planning Commission for further consideration.

(6) Any decision by the City Council approving or denying the conditional use permit shall be final and subject to the conditions imposed by the Council. The Development Code shall not be construed to vest a right to any conditional use except upon complete and continued compliance with the conditions finally approved.

EXHIBIT "C"

RESOLUTION #91-60 C

A RESOLUTION DISAPPROVING SALT LAKE COUNTY COTTONWOOD SANITARY DISTRICT'S APPLICATION FOR A CONDITIONAL USE PERMIT AT 1980 VISCOUNTI DRIVE, SANDY, UTAH, AND ADOPTING FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THAT DISAPPROVAL

WHEREAS, the application of Salt Lake County Cottonwood Sanitary District (herein "District") for a conditional use permit for the construction of a building complex at 1980 Viscounti Drive was heard by the Sandy City Council on July 16, 1991 and July 30, 1991, on appeal of a decision of the Sandy City Planning Commission concerning such permit; and

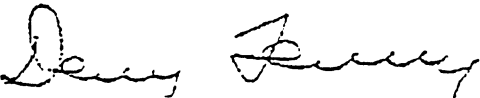
WHEREAS, the City Council reviewed documents and testimony entered into evidence, and thereafter determined to disapprove the District's application for a conditional use permit and to make and enter findings of fact and conclusions of law concerning such denial;

NOW, THEREFORE, BE IT RESOLVED by the City Council of Sandy City, Utah, as follows:

1. The District's application for a conditional use permit is hereby disapproved.

2. The Findings of Fact and Conclusions of Law attached hereto are hereby adopted.

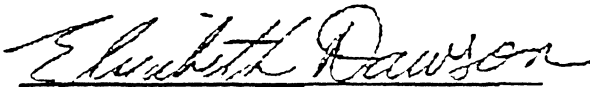
Passed by the City Council of Sandy City, Utah, this 1st day of October, 1991.



Dennis R. Tenney, Chairman
Sandy City Council

DENNIS TENNEY, VICE CHAIRMAN
Acting Chairman

ATTEST:



Elizabeth Dawson
City Recorder

RECORDED this 2nd day of October, 1991. ES



BEFORE THE SANDY CITY COUNCIL

IN THE MATTER OF THE PROPOSED :
COTTONWOOD SANITARY DISTRICT : FINDINGS OF FACT
CONDITIONAL USE ON VISCONTI : AND
DRIVE : CONCLUSIONS OF LAW

The application of Salt Lake County Cottonwood Sanitary District for a conditional use permit for the construction of a building complex at 1980 Viscounti Drive, having come before the Sandy City Council for hearing on July 16, 1991 and July 30, 1991, on appeal of a decision of the Sandy City Planning Commission concerning such permit; the Council having heard the evidence and having reviewed documents and testimony entered into evidence, makes and enters the following:

FINDINGS OF FACT

1. On about March 21, 1991, an agent for Salt Lake County Cottonwood Sanitary District (herein "District") filed an application with Sandy City, requesting a conditional use permit for the construction of a building complex on an approximately 3 acre site at 1980 Viscounti Drive, Sandy City. On April 11, 1991, RRB Company, a Utah limited partnership and owner of the site upon which the complex was to be located, appointed the District as its agent to represent it with regard to the application.

2. The District facilities were to consist of business offices and a building to be used for vehicle storage and maintenance. The site is located within a residential

neighborhood and adjoins Viscounti Drive on the north and Highland Drive on the east. At the time of the District application and thereafter, the site of the proposed Cottonwood facility and its abutting properties were zoned R-1-8 Residential. The District complex is not a "permitted use" within that zone.

3. On April 4, 1991, the Sandy City Planning Commission (herein "Planning Commission") held a hearing to consider the District's application. During that meeting, it was determined that this was a "public service facility," and as such, would be a "conditional use" within the zone. It was first proposed that the buildings be located directly to the east of the new LDS Chapel (under construction), and running southward adjacent to the church property. The meeting was continued for further review.

4. On April 18, 1991, the Planning Commission reviewed a revised proposal which included moving the building to the corner of Highland Drive and Viscounti Drive, with the majority of the site's frontage along Viscounti Drive. The Planning Commission denied the application at this location.

5. On May 16, 1991, by a vote of 3 to 2, the Planning Commission approved a third site proposal for the District's complex to be located on the corner of Viscounti Drive and Highland Drive, with the buildings running southward along the Highland Drive frontage, on conditions summarized as follows:

- (1) That the use, including the 24 hour operation of the RV

Disposal Station, be reviewed upon complaint.

(2) That street dedications and improvements be carried out according to approved plans and specifically that Viscounti Drive and Highland Drive be dedicated and improved.

(3) That the developer comply with the Sandy City Water Policy.

(4) That the developer provide a site plan prior to the start of construction (including payment of fees, and posting of an appropriate bond to guarantee completion of all required on and off-site improvements).

(5) That any roof mounted mechanical equipment and vents be screened from view from adjacent streets and properties, with one continuous architecturally designed screening system -- the roof screen to be designed to blend with the architecture of the building and to manage snow loads.

(6) That signs have separate approvals and permits prior to installation.

(7) That front landscape areas incorporate berming to City standards.

(8) That trash bins be enclosed and located to the rear of the property.

(9) That the developer be responsible for the moving of any utility poles that may be left in the right-of-way adjacent to the development.

(10) That the developer fence along the south and west sides of the development, adjacent to the remaining residentially

zoned property.

(11) That landscaping along the west and south sides be a minimum of 10 feet, and that additional landscaping be provided within the back parking lot area, to bring the site up to the 5% landscaping typically required of commercial developments in parking lot areas.

(12) That maintenance vehicles associated with this facility be stored inside the vehicle storage building when not in use.

(13) That the proposed RV Disposal Station be built according to approved plans, to provide secondary catch basins on both sides of the island for possible spills to be drained directly into the disposal system

(14) That adequate security lighting be included and all lighting on the site be directional, down lit and shielded, if necessary.

(15) That heavy evergreen landscaping be added to the front landscape area along Viscounti Drive.

(16) That driveway locations and designs shall be reviewed and approved.

(17) That parking spaces and aisles must be drawn to Sandy City standards.

(18) That all trucks and traffic be prohibited from turning west on Viscounti Drive when exiting the facility, except when the sewer system in the area is scheduled to be maintained or serviced.

(19) That the Site Plan Review come back to the Planning Commission for approval.

6. On June 6, 1991, by vote of 6 to 1, the Planning Commission approved the preliminary site plan for the project subject to the following conditions:

(1) That the applicant comply with all conditions of approval that were imposed by the Planning Commission on May 16, 1991.

(2) That the applicant provide street trees in the parkstrips along Viscounti Drive and Highland Drive according to the Sandy City Streetscape Plan.

(3) That evergreen trees be incorporated into the landscaping along Viscounti Drive.

(4) That all materials stored at the site must be placed inside the buildings.

(5) That this approval is subject to the City Council's action regarding a pending appeal to the granting of the permit.

7. On July 16, 1991, the City Council held a public hearing to consider an appeal filed by Kirk Wcoley and David Bjorkman, on behalf of the residents of the City's Alta Canyon community to the conditional use approval granted by the planning Commission on May 16, 1991. Extensive evidence was received by the Council at that hearing from the applicant and members of the public. The hearing was continued for two weeks for further study.

8. On July 30, 1991, the City Council hearing was resumed and Council deliberations were concluded. Thereafter, the Council, by a vote of 6 to 1, granted the appeal, effectively overturning the decision of the planning commission and denying the conditional use permit.

CONCLUSIONS

1. The City Council has broad jurisdiction to plan for appropriate development within Sandy City and to restrict development under regulations developed pursuant to such plans. The City Council also has statutory authority to review conditional use decisions under UTAH CODE ANN. §10-9-9(2), which states as follows:

Appeals from decisions of the planning and zoning commission regarding conditional use permits shall be heard by the board of adjustment unless the legislative body of the municipality by ordinance has designated another body as the appellate body for those matters.

2. The City Council has duly adopted an authorizing ordinance which designates it as the appellate body for conditional use appeals from decisions of the planning commission. That ordinance is designated as §15-23-6 of the City's Development Code.

3. Those persons appealing the Planning Commission's approval of the District's conditional use had a right to appeal to the City Council under such ordinance and that appeal is properly before the City Council for review.

4. The City Council has jurisdiction to review the District's conditional use application under its statutory powers

and §15-23-7 of its Development Code, and to deny such application on the basis set forth below.

5. The City Council had authority to hold public hearings on this matter and to secure public comment. Such open process ensures fairness, promotes public support for both the process and its results, educates the public, enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the public and the society as a whole.

6. The District bears the burden of identifying conditions necessary for the protection of the public and any costs associated therewith are properly attributable to the District as a charge against its profits.

7. The District has failed to meet its burden to demonstrate:

- (a) that the proposed use is an authorized "conditional use" within the zoning district;
- (b) that the landscaping and other conditions imposed by the Planning Commission meaningfully relate the proposed use to permitted residential uses within the zoning district or make its "conditional" complex like a "permitted" use in terms of its impact on the health, safety and welfare of the public.
- (c) that appropriate conditions can be imposed on the District's complex which will make it compatible, suitable, desirable and related to permitted uses within the zoning district; or

(d) that, once approved, requirements and conditions necessary to address changing circumstances (e.g., business growth, management changes, and operational adjustments) can be practically anticipated sufficient to reasonably secure the future health, safety and welfare of the residential neighborhood.

8. Relevant evidence concerning the proposed use was presented at hearing before the city council which was not made fully available to the Planning Commission at the time of its deliberation.

9. The proposed use is not residential in character or otherwise compatible, suitable, desirable and related to permitted uses within the zoning district.

10. A sewer district complex at this particular location is not necessary or desirable to provide a service or facility which will contribute to the general well-being of the community and the neighborhood. Further, alternative sites, including the District's current site, can be used or developed without the magnitude of adverse impact imposed at this site.

11. Persons residing or working in the adjacent neighborhood have a right to be free from risks associated with proposed nonconforming uses and the District's use at this location will be detrimental to the health and safety of persons residing or working in the community and injurious to property values in the neighborhood for reasons which include the following:

(a) Existing traffic regulation and enforcement efforts have been inadequate to provide traffic safety in the area and the proposed use will generate traffic in such amounts and of such a nature as to substantially increase traffic risks in the area.

(b) The proposal will likely change the intended characteristics of the district as outlined by the development code due to (1) the non-residential nature, scale, and design of the site proposal; and (2) increases in site traffic (including heavy equipment), light, odor, noise or other environmental pollution generated by the proposed use.

12. The adjacency of the LDS church to this proposed site aggravates the impact of the proposed non-residential use on the surrounding neighborhood and, the combination of non-residential uses effectively relocates current homes out of their existing residential neighborhood and into a large-scale institutional setting.

13. The proposed use will encourage further institutional or quasi-commercial/industrial uses onto adjacent vacant properties; thus, influencing patterns of growth adverse to the intent and integrity of the comprehensive plan and undermine the welfare of the surrounding neighborhood and community.

14. The conditions imposed by the Planning Commission were not supported by findings. Further, they gloss over and fail to mitigate the traffic and other public safety impacts described

above, and, due to the basic nature and scale of the complex, the imposition of any reasonable conditions, or combination thereof, would be insufficient to make the complex compatible, suitable, or desirable within the zoning district.

15. For reasons stated above, denial of the District's proposed conditional use appropriately balances competing interests in consonance with constitutional principles, is in the public interest, and serves the public good.

DATED this _____ day of September, 1991.

SANDY CITY COUNCIL

John-Absent, Scott-Yes, Ron-Yes

MOTION PASSED

7. Discussion/Decision: Adoption of Findings, Council decision regarding citizen's appeal of Cottonwood Sanitary District Conditional Use. (Highland Drive and Visconti)
(Cottonwood Sanitary District Conditional Use)

MOTION: Dennis Tenney made the motion to TABLE action on this issue.

SECOND: Bruce Steadman

VOTE: The Council responded verbally, "Yes".

TABLED

CONSENT CALENDAR:

8. Approval 8-27-91 Council Meeting Minutes, and Approval 9-3-91 Council Meeting Minutes.

MOTION: Dennis Tenney made the motion to adopt the Consent Calendar as amended.

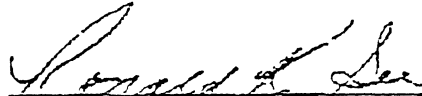
SECOND: Bruce Steadman

VOTE: Council responded with a "Yes" vote.

MOTION PASSED

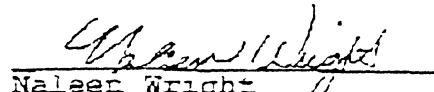
At approximately 11:00 p.m., a motion was made by Dennis Tenney to adjourn the meeting; seconded by Bruce Steadman.

Minutes herein as written and approved by:



Ronald K. Gae
Council Chairman





Naleen Wright
Council Secretary

XM092491

SECOND: Dennis Tenney
VOTE: Bryant-Yes, Dennis-Yes, Bruce-Yes, Dick-Absent,
John-Yes, Scott-Yes, Ron-Absent

MOTION PASSED

5. Resolution #91-60 C - adoption of Findings, regarding citizen's appeal to the Council of the Cottonwood Sanitary District Conditional Use. (Highland Drive and Visconti).
(Findings: Denial Cottonwood Sanitary District Conditional Use)

MOTION: John Winder made the motion to adopt the resolution as presented.
SECOND: Dennis Tenney
VOTE: Dennis-Yes, John-Yes, Bryant-Yes, Dick-Absent, Bruce-Yes, Scott-Yes, Ron-Absent

MOTION PASSED

6. Update regarding a request from Overland Development Corporation to amend Sandy City's Development Code Section 15-29 regarding the SD(PUD)22 District. The amendments would allow the Planning Commission the ability to consider alternative parking arrangements, alternative construction materials, and would eliminate the existing restriction of allowing only one and two-bedroom apartments in the zoning District.
(Cd Amend: SD(PUD) 22 District)

DISCUSSION: Brian Maxfield introduced the developer, Ken Holma and asked him to address the concerns and questions posed at previous meetings by the Council.

Mr. Holman stated that an agreement with the canal company, the Jordan School District, and the Eyries (a property owner who will be providing 6 feet of his property, so access from the development to the school can be achieved) has been reached. A fully fenced and covered walkway will be constructed to provide safe crossing of the canal.

Scott Cowdell asked Mr. Holman if there had been substantial changes made to his proposed site plan, from the original plan viewed by the Council?

Mr. Holman stated, "No, other than the school walkway." He said the Council's concern that the driveways were too narrow has been addressed. The site plan shows these driveways being constructed at 26 feet. This is 2 feet wider than what is required by Sandy code.

Bruce Steadman stated that there are not enough compensations being offered by the developer, for the zone changes being requested. He felt the developer was overcrowding the site with too many structures.

Mr. Holman responded that he is sorry he ever presented a site plan before the Site Plan Review Hearing. He said they will meet City requirements (including the required 50% open space). They have hired a professional architect to insure that their project is a quality development. Mr. Holman cited other developments that he has been

EXHIBIT "D"

10-9-9. Appeals to board — Time — Persons entitled — Transmission of papers — Appeals from planning and zoning commission.

(1) Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. The appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds for the appeal. The officer from whom the appeal is taken shall immediately transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

(2) Appeals from decisions of the planning and zoning commission regarding conditional use permits shall be heard by the board of adjustment unless the legislative body of the municipality by ordinance has designated another body as the appellate body for those matters.

EXHIBIT "E"

CHAPTER 15-23 CONDITIONAL USES

- 15-21-1 PURPOSE
- 15-23-2 REQUIREMENT
- 15-23-3 DETERMINATION
- 15-24-4 BUILDING PERMIT
- 15-24-5 TIME LIMIT
- 15-25-6 GUIDELINES FOR CONDITIONS

15-23-1 PURPOSE

The purpose and intent of a conditional use is to allow the compatible integration of specified uses which are related to the permitted uses of the district, but which may be suitable and desirable only by compliance with specified conditions. Uses other than permitted uses shall not be allowed unless after appropriate administrative review, a use is determined to be compatible, suitable, desirable and related to permitted uses of the district and appropriate conditions are imposed.

15-23-2 REQUIREMENT

A Conditional Use Permit shall be required for all uses listed as conditional uses in each Zone District or elsewhere in the Land Development Code. A Conditional Use Permit may be revoked upon failure to comply with conditions of the original approval.

- (a) Application. Application for a Conditional Use Permit shall be made by the property owner or certified agent thereof to the Community Development Director.
- (b) Conditional Use Permit Approval. The application shall be accompanied by maps, drawings, or other documents sufficient to meet the requirements of a site plan review (Chapter 15-22) for those conditional uses which require such a review, and sufficient information to demonstrate that the general and specific requirements of this Code will be met by the construction and operation of the proposed building, structure, or use. The Planning Commission may deny a permit; may grant a permit as applied for ; or may grant a permit subject to such requirements and conditions with respect to location, construction, maintenance, operation, and duration of the proposed use as it may deem necessary for the protection of adjacent properties and the public interest. The granting of a Conditional Use Permit shall not exempt the applicant from the applicable requirements outlined in this or other ordinances of Sandy City or any more restrictive provisions of covenants, agreements or other ordinances or laws.

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- (c) Fee. The application for any Conditional Use Permit shall be accompanied by the appropriate fee established by resolution of the City Council. An application form is available at the Department of Community Development.
- (d) Public Hearing. A public hearing shall be held when considered by the Planning Commission to be in the public interest. Such hearing shall follow the procedure as described in Section 15-23-2(b). In the following instances the holding of a public hearing shall be mandatory:
 - (1) The Planning Commission determines that existing streets and thoroughfares are not suitable or adequate to carry anticipated traffic, and increased densities resulting from the proposed use may generate traffic in such amounts as to overload the street network.
 - (2) The Planning Commission determines that increases in miscellaneous traffic, light, odor, noise or environmental pollution generated by the proposed use may significantly change the intended characteristics of the district as outlined in this Code.
 - (3) The Planning Commission determines that the architectural design of the proposed use varies significantly from the architectural characteristics of the district in which such use is proposed.
 - (4) Any commercial use within 250 feet of a residential district, when such commercial use operates between 10:00 p.m. and 6:00 a.m. of any day, and/or any industrial use within 300 feet of a residential district or use.
 - (5) Any use that involves materials which are determined by the Sandy City Fire Chief to be hazardous, dangerous, or otherwise pose a threat to the health, safety and welfare of the community.

15-23-3 DETERMINATION

Uses other than permitted use shall not be allowed. However, the Planning Commission may allow a use to be located within any district in which the particular use is allowed as a conditional use by this Code if it determines the use is appropriate after due consideration and evaluation. In authorizing any conditional use, the Planning Commission shall impose such requirements and conditions necessary for the protection of adjacent properties and the public welfare. The Planning Commission shall not authorize a Conditional Use Permit unless the evidence presented is such as to establish:

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- (a) That the proposed use of the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the community and the neighborhood; and
- (b) That such use will not, under the circumstances of that particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
- (c) That the proposed use will comply with regulations and conditions specified in this Code for such use; and
- (d) That the proposed use will conform to the intent of the Sandy City Comprehensive Plan; and
- (e) That conditions imposed by the Planning Commission shall be based upon guidelines described in Section 15-23-6 or any special conditions or requirements as may be specified elsewhere in this Code.

15-23-4 BUILDING PERMIT

Following the issuance of Conditional Use Permit by the Planning Commission and site plan review, if required, the Director may approve an application for a building permit and shall ensure that development is undertaken and completed in compliance with said permit.

15-23-5 TIME LIMIT

Unless the uses and conditions prescribed in a Conditional Use Permit are implemented within a maximum period of one year of its issuance, the Conditional Use Permit shall expire. The Planning Commission may grant a "one time" maximum extension of up to six months under exceptional circumstances.

15-23-6 GUIDELINES FOR CONDITIONS

Applicants for conditional use permits shall meet all specific requirements made in this Development Code. Applications for conditional use permits which are business-oriented must meet all requirements deemed necessary by the Business License Division. In addition, the Planning Commission may establish conditions as outlined herein to meet the concerns of safety for persons and property, health and sanitation, environment, comprehensive plan proposals and neighborhood needs, performance, and administration. More specifically, the Planning Commission may require:

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(a) Conditions Relating to Safety for Persons and Property

- (1) Building elevations and grading plans which will prevent or minimize flood water damage, where property may be subject to flooding; for example, down sloping driveways.
- (2) The relocation, covering or fencing of irrigation ditches, drainage channels, and other potentially attractive nuisances existing on or adjacent to the property.
- (3) Increased setback distances from lot lines where the Planning Commission determines it to be necessary to ensure the public safety.
- (4) Appropriate design, construction, and location of structures, buildings, and facilities in relation to any earthquake fault or other seismic hazard, which may exist on or near the property, and limitations and/or restrictions to use and/or location of use due to site conditions, including but not limited to flood plains or landslide areas that may exist outside of the Sensitive Area Overlay Zones.
- (5) Additional restrictions on the arrangement and dimensions of truck loading and unloading facilities.
- (6) Construction of curbs, gutters, drainage culverts, sidewalks, streets, fire hydrants, and street lighting.
- (7) Wind Energy Conversion Systems (see standards, Section (15-21-14(b)).

(b) Conditions Relating to Health and Sanitation

- (1) A guarantee of sufficient water to serve the intended land use and a water delivery system to be installed which meet standards adopted by the City.
- (2) A wastewater disposal system approved by the appropriate sewer district.
- (3) Solid waste disposal constructed according to standards adopted by the City Council, and any additional standards deemed reasonably necessary by the Planning Commission.
- (4) Construction of water mains, sewer mains, and drainage facilities serving the proposed use, in sizes necessary to protect existing utility users in the district and to provide for an orderly development of land in the city.

(c) Conditions Relating to Environmental Concerns

CONDITIONAL USES

- (1) Limitations and/or restrictions on the use and/or location of uses in areas that may exist outside of the Sensitive Area Overlay Zone area due to soils capabilities, wildlife, and plant life.
 - (2) Processes for the control, elimination, or prevention of land, water, or air pollution; the prevention of soil erosion; and the control of objectionable odors and noise, if not already covered by provisions of Chapter 13, Development and Design Standards.
 - (3) The planting of ground cover or other surfacing to prevent dust and erosion.
 - (4) Restructuring and revegetation of the land when the use involves cutting and/or filling the land and where such land would be adversely affected if not restructured.
- (d) Conditions Relating to Compliance with Intent of Comprehensive Plan and Characteristics of the Zone District
- (1) Limitation that certain conditional uses be located only on lots fronting arterial or collector streets within the district.
 - (2) The removal of structures, debris, or plant materials incompatible with the desired characteristics of the district.
 - (3) The screening of yards or other areas as protection from non-compatible land uses and activities.
 - (4) Landscaping in addition to that which may be required in other chapters of this Code, to ensure compatibility with the intended neighboring land uses.
 - (5) Limitations or controls on the location, height, lighting and materials used for the construction of structures to ensure harmony with the characteristics of the neighboring land uses specifically if the use abuts a residential district.
 - (6) Limitations or controls on the location, height, and materials of walls, fences, hedges, and screen plantings to ensure harmony with adjacent development, or to conceal storage areas, utility installations, or other unsightly development.
 - (7) The relocation of proposed or existing structures as necessary to provide for future streets on the Official Street Map, adequate sight distances for general safety, groundwater control, or similar problems.

CONDITIONAL USES

- (8) Provision for or construction of recreational facilities necessary to satisfy the needs of the conditional use.
- (9) Increased setback distances from lot lines where the Planning Commission determines it to be necessary to ensure compatibility with the characteristics of the district.
- (10) Modification to allow population density and intensity of land use where land capability and/or vicinity relationships make it appropriate to do so to protect health, safety, and welfare.
- (11) Other improvements which serve the property in question and which may compensate in part or in whole for possible adverse impacts to the district from the proposed conditional use.

(e) Conditions Relating to Performance

- (1) A bond or other valuable assurance in favor of the city in an amount to be determined by the City may be required. Refer to Section 15-21-18.

(1) All appeals from decisions of the Planning Commission regarding conditional use permits shall be heard by the City Council.

(2) Except as provided in subsection (3), review of decisions of the Planning Commission shall be confined to the administrative record developed by the Commission.

(3) The City Council may hold a public hearing or permit an evidentiary review outside the Planning Commission record to determine whether:

(a) An alleged procedural irregularity has occurred that does not appear in the record.

(b) The proposed use would (i) influence patterns of growth adverse to the integrity of the comprehensive plan as implemented by the zoning ordinance; (ii) have a long-term detrimental impact on City resources available for capital improvements or urban services; or (iii) undermine the health, safety or welfare of the surrounding neighborhood or community. "

(4) Hearings may be held by the City Council itself, or by any Council member, hearing examiner, or agent appointed by the Council.

(5) The City Council may overrule any approval or disapproval by the Planning Commission, or any conditions imposed. It may approve or deny the conditional use, impose additional conditions thereon, or remand the appeal to the Planning Commission for further consideration.

(6) Any decision by the City Council approving or denying the conditional use permit shall be final and subject to the conditions imposed by the Council. The Development Code shall not be construed to vest a right to any conditional use except upon complete and continued compliance with the conditions finally approved.

EXHIBIT "F"

paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) **Grounds for relief.** Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) **Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(e) **Wrongful use of judicial authority or failure to comply with duty.**

(1) **Who may petition.** A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief.

(2) **Grounds for relief.** Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; or (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

(3) **Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) **Scope of review.** Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991.)